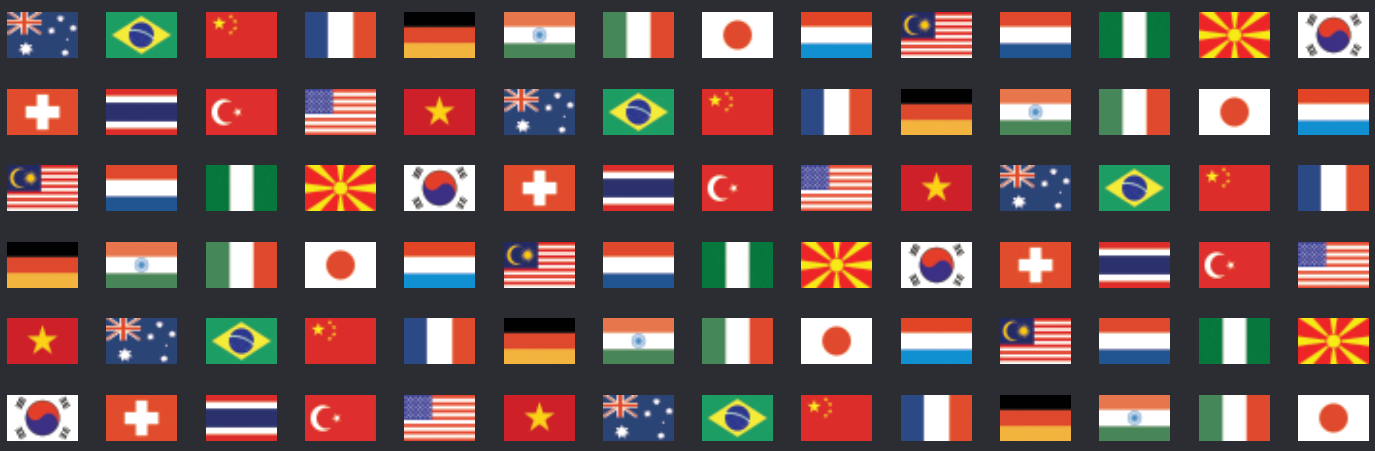
Corporate Governance 2021

Contributing editor
Holly J Gregory



LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the twentieth edition of *Corporate Governance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Australia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Holly J Gregory, for her continued assistance with this volume.

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Contents

Switzerland

Thomas Schmid, Stefan Scherrer and Norbert Schenk

BianchiSchwald LLC

SOURCES OF CORPORATE GOVERNANCE RULES AND PRACTICES

Primary sources of law, regulation and practice

1 What are the primary sources of law, regulation and practice relating to corporate governance? Is it mandatory for listed companies to comply with listing rules or do they apply on a 'comply or explain' basis?

The primary sources of law are the provisions on stock corporations in the Swiss Code of Obligations and, for listed companies, the Swiss Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading. In the financial sector, the regulations and practice of the Swiss Financial Market Supervisory Authority (FINMA) regarding corporate governance also have to be complied with. As regards executive compensation, listed companies with a registered office in Switzerland must comply with the Ordinance against Excessive Compensation in Listed Companies.

Further, there are the listing rules and circulars of the two Swiss stock exchanges, SIX Swiss Exchange (SIX) and BX, in particular the SIX Directive on information relating to corporate governance, obliging issuers to disclose certain information with regard to corporate governance in a separate section of their annual reports on a comply or explain basis.

Also of relevance is the Swiss Code of Best Practice for Corporate Governance (SCBP) published by Economiesuisse, a federation representing the interests of the Swiss business community. The SCBP contains non-binding recommendations that serve as guidelines for good governance. The SCBP primarily addresses listed companies, but it is also used by non-listed companies and other organisations. Economiesuisse, in addition, has issued the Guidelines for institutional investors governing the exercise of shareholder rights in Swiss listed companies, containing best practice for the exercise of shareholders' rights by institutional investors.

Lastly, there are proxy voting guidelines of influential proxy advisers, such as Ethos or ISS, which include corporate governance principles.

The answers in this chapter are focused on generally applicable corporate law and do not address specific regulations applicable to regulated companies, in particular in the financial sector.

Responsible entities

2 What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder or business groups, or proxy advisory firms, whose views are often considered?

The Swiss parliament and the Federal Council (executive body) enact laws and ordinances. As regards regulations applicable to listed companies, FINMA and the Swiss Takeover Board are responsible for enforcing stock exchange and public takeover law. Stock exchange law is also enforced by SIX and BX.

There are various proxy advisers active in Switzerland, among which Ethos is probably the most influential.

THE RIGHTS AND EQUITABLE TREATMENT OF SHAREHOLDERS AND EMPLOYEES

Shareholder powers

3 What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action? What shareholder vote is required to elect or remove directors?

The shareholders' meeting elects and removes the members of the board of directors (the board). This duty is non-transferable. The shareholders' meeting of listed companies is required by the Ordinance against Excessive Compensation in Listed Companies to hold these elections on an annual basis; non-listed companies may provide for a term of office of more than one year. The shareholders' meeting of listed companies also elects the chair of the board and the members of the compensation committee, which must be established mandatorily; in non-listed companies, the board may define its organisation without requiring a shareholders' vote.

Pursuant to the Swiss Code of Obligations, one or more shareholders representing at least 10 per cent of the company's share capital may request that the board convene a shareholders' meeting. These shareholders, or any other shareholders representing shares with a nominal value of 1 million Swiss francs or more, may demand that an item be put on the agenda. Listed companies often reduce the threshold in their articles of association to increase their governance ratings.

There are various rights of individual shareholders, for example, to request a special audit to be conducted regarding the conduct of business by the board (subject to a shareholders' vote with the required quorum) and to present motions to shareholders' meetings, to the extent covered by the agenda items.

Elections of board members and most other resolutions of the shareholders' meeting require the absolute majority of the votes represented at the respective meeting. Beyond these resolutions regarding shareholders' matters, the shareholders have no right to require the board to pursue a particular course of action.

Shareholder decisions

4 What decisions must be reserved to the shareholders? What matters are required to be subject to a non-binding shareholder vote?

In listed and non-listed companies, the following non-transferable matters require a resolution by the shareholders' meeting:

- adoption and amendment of the articles of association;
- election of the members of the board and the auditors;
- approval of the management report and, if applicable, the consolidated group financial statements;
- approval of the annual financial statements and use of the balance sheet profits; in particular, the determination of dividends;
- discharge of the members of the board; and
- adoption of decisions reserved for the shareholders' meeting by law or the articles of association.

In listed companies, the following additional matters require a resolution by the shareholders' meeting:

- election of the chair of the board;
- election of the members of the compensation committee;
- election of the independent proxy; and
- approval of the compensation of the board, the top-level management (management) and the advisory body.

Swiss corporate law does not provide for non-binding shareholder votes.

However, non-binding votes regarding past compensation reports are still held in shareholders' meetings of most listed companies to allow the shareholders to express their opinion.

Disproportionate voting rights

5 To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

Companies may introduce classes of shares with a voting preference or a voting limit in their articles of association (ie, a clause that limits the ability to exercise voting rights by a shareholder or group of shareholders to a certain percentage of the total votes). The maximum ratio permitted between common shares and shares with a voting preference is 1:10. Voting preferences do not apply to certain decisions of the shareholders' meeting, in particular the appointment of experts to audit the company's management, special audits or the initiation of a liability claim against board members.

Shareholders' meetings and voting

6 Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote? Can shareholders act by written consent without a meeting? Are virtual meetings of shareholders permitted?

In the case of registered shares, a shareholder needs to be registered in the share register to participate and exercise its membership rights in a shareholders' meeting. With respect to bearer shares, the authority to participate and to exercise the membership rights derives from the possession and presentation of the bearer shares. A shareholder may be represented by a third party, which, unless otherwise provided for in the articles of association, must not be a shareholder.

The membership rights (including the right to vote) in non-listed companies are suspended if and as long as the shareholder fails to comply with its reporting obligation regarding the beneficial ownership of the shares. This reporting obligation applies, with respect to registered shares, if a stake of 25 per cent or more of the share capital or votes is acquired and, for bearer shares, in respect of any acquisition, in both cases unless the shares are issued as intermediated securities in accordance with the Federal Act on Intermediated Securities.

Except as a temporary measure to fight the covid-19 pandemic, shareholders' resolutions by written consent (without a physical meeting) or virtual meetings of shareholders (including direct electronic voting) are not permitted under Swiss law. Multisite shareholders' meetings (including video and sound transmission) are, however, considered permissible. In addition, listed companies are required to provide for means allowing the electronic issuing of powers of attorney and voting instructions to an independent proxy.

Shareholders and the board

7 Are shareholders able to require meetings of shareholders to be convened, resolutions and director nominations to be put to a shareholder vote against the wishes of the board, or the board to circulate statements by dissident shareholders?

Outside of shareholders' meetings, shareholders may require shareholders' meetings to be convened by the board if, alone or together, they represent 10 per cent of the issued share capital of the company or shares with a nominal value of at least 1 million Swiss francs. Such a request to the board must be made in writing and be sufficiently precise. If such a request is not complied with within a reasonable time period, the shareholders may request a court to convene a shareholders' meeting.

With the exception of resolutions on the convocation of a shareholders' meeting, on the appointment of an auditor, or to carry out a special audit, an amendment of the agenda will generally be necessary to vote on resolutions against the wishes of the board. Such an amendment of the agenda is subject to the same requirements that apply to requests to convene a shareholders' meeting and must be requested sufficiently early to allow the amended invitation to the shareholders' meeting to be issued in time (ie, in accordance with the law, at least 20 days before the shareholders' meeting (the articles of association may prolong this deadline but not shorten it)). However, it is often impossible to obtain a decision of the court in time, so it is also necessary to request a convocation of a new shareholders' meeting.

It should be noted that:

- the aforementioned requirements may be made less (but not more) stringent by the company's articles of association (this is often the case in listed companies and is addressed by the SCBP as a way to comply with the recommendation that companies should endeavour to facilitate the exercise of shareholders' statutory rights);
- during a shareholders' meeting, any shareholder may require a vote on the convocation of another shareholders' meeting; and
- shareholders representing 100 per cent of the share capital are always free to hold a universal assembly, in which case the limitations mentioned above become irrelevant.

Dissident shareholders may require statements to be made into protocols in the minutes of the shareholders' meeting. However, they may not request that the board circulate dissenting statements prior to or after shareholders' meetings.

Controlling shareholders' duties

8 Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action be brought against controlling shareholders for breach of these duties?

In non-listed companies, the only duty of all shareholders, including controlling shareholders, is to pay the issue price for their shares.

In listed companies, shareholders (or groups of shareholders) reaching or exceeding the threshold of 3 per cent of all voting rights have certain disclosure obligations, and shareholders (or groups of shareholders) reaching or exceeding the threshold of one-third of the voting rights have the duty to make an offer to all other shareholders to acquire their shares at a certain minimum price. The threshold for this duty to make a mandatory offer may be increased in the articles of association to up to 49 per cent of the voting rights or the company

may opt out from the requirement to make such an offer. The Swiss Financial Market Supervisory Authority and the Swiss Takeover Board may enforce these duties.

Recently, it has become more common for controlling shareholders to enter into relationship agreements with the (listed) company they control. These agreements typically contain provisions regarding the composition of the board, information flow to the shareholders, the taking of decisions, and other matters found in shareholders' agreements.

Shareholder responsibility

9 | Can shareholders ever be held responsible for the acts or omissions of the company?

The piercing of the corporate veil and, thus, a direct liability of a shareholder for acts or omissions of a legal entity is limited to highly qualified abuse of right situations. Additionally, if a shareholder is involved in the management of a company, he or she may be deemed to be a de facto body of this company and, thus, be held liable for intentional or negligent breach of his or her duties.

Employees

10 | What role do employees have in corporate governance?

Employees have no specific role under Swiss corporate law. In particular, there is no obligation to elect an employee representative to the board.

CORPORATE CONTROL

Anti-takeover devices

11 | Are anti-takeover devices permitted?

Yes, in particular, the following:

- transfer restrictions on registered shares;
- voting limits;
- privileged voting shares; and
- introduction of an increased quorum for certain shareholders' decisions.

Issuance of new shares

12 | May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

No shares may be issued without prior authorisation by the shareholders' meeting.

Each shareholder has a pre-emptive or preference subscription right to acquire new shares in proportion to its actual participation in the company. However, the shareholders' meeting may exclude pre-emptive rights (or grant the board authorisation to do so) for good cause by at least two-thirds of the voting rights represented in the shareholders' meeting and an absolute majority of the par value of shares, if this cancellation of the pre-emptive rights does not result in any improper advantage or disadvantage to any shareholder.

Restrictions on the transfer of fully paid shares

13 | Are restrictions on the transfer of fully paid shares permitted and, if so, what restrictions are commonly adopted?

Non-listed companies may provide in their articles of association that registered shares may only be transferred with the board's approval, which can be denied based on important reasons specified in the articles of association. In any case, the company may acquire the respective shares for its own account, the account of other shareholders or for the account of a third party at fair market value, or refuse the transfer and the registration of the transferee in the company's share register if the acquirer does not explicitly state that it has acquired the shares in its own name and on its own account. In the case of transfers based on inheritance, division of an estate, matrimonial property law or compulsory execution, the company may withhold its consent only if it offers to purchase the shares at their fair market value.

Listed companies are more restricted and may only refuse a share transfer if the acquirer:

- exceeds a certain percentage of the company's voting rights (subject to a respective transfer restriction being included in its articles of association); or
- fails to state that it holds the acquired shares in its own name and on its own account.

In each case, the listed company may only prevent the shareholder from exercising its voting rights but not the transfer of title of the acquired shares (ie, the acquirer will be entitled to any resolved dividends in any case). Transfers based on inheritance, division of estate or matrimonial property law may not be refused by listed companies.

Compulsory repurchase rules

14 | Are compulsory share repurchases allowed? Can they be made mandatory in certain circumstances?

Companies may repurchase their own shares up to a limit of 10 per cent of their share capital (if the repurchase is made in connection with transfer restrictions, a threshold of 20 per cent applies) provided that the company has sufficient freely available equity. These share repurchases are not, and cannot be made, mandatory.

Dissenters' rights

15 | Do shareholders have appraisal rights?

No, there are no appraisal rights of shareholders. However, in connection with a squeeze-out merger, the company may compensate the squeezed-out minority shareholders with a cash payment at fair market value.

RESPONSIBILITIES OF THE BOARD (SUPERVISORY)

Board structure

16 | Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

In listed companies, the predominant board structure is a two-tier structure, as the board normally delegates some of its duties to the management.

Board's legal responsibilities

17 | What are the board's primary legal responsibilities?

The board is responsible for managing the business of the company, in accordance with its duty of care and fiduciary duty, to the extent that tasks have not been delegated to the management. In general, the board may adopt decisions on all matters that are not explicitly reserved to the shareholders' meeting by law, by the articles of association or delegated to the management based on organisational regulations. The board often delegates a major part of the transferable responsibilities to a management. In such a case, however, the board remains liable for the due selection, instruction and supervision of the parties to whom it has delegated responsibilities.

Board obligees

18 | Whom does the board represent and to whom do directors owe legal duties?

The board represents the company, and directors are obliged to act in the company's best interest. The company's purpose is stated in its articles of association. There is no clear view in legal literature or court practice as to which interests must be considered by the directors, in particular, whether the focus must be on shareholders' interests or whether and to what extent other stakeholders' interests may have to be taken into account.

The SCBP is focused on safeguarding 'sustainable company interests', which implies a time component (long-term perspective) often taken into account by boards in their decision-making process.

Enforcement action against directors

19 | Can an enforcement action against directors be brought by, or on behalf of, those to whom duties are owed? Is there a business judgement rule?

Any director and any other persons engaged in, and with a significant influence on, the management or the liquidation of a company may, irrespective of whether or not formally appointed as directors, liquidators or any other similar function, be held liable for any intentional or negligent breach of their duties.

Whenever shareholders or creditors suffer direct damage (as opposed to indirect damage resulting from direct damage to the company itself), they are entitled to bring an action for compensation of the damage. With respect to damage to the company, the company as well as the shareholders and, in the case of insolvency only and subject further to the insolvency administrators not having taken legal action, the creditors may bring an action, whereby both the shareholders and the creditors may only ask for the compensation of the company's damage (ie, payment to the company).

It is established case law that decisions of the board in compliance with the business judgement rule do not constitute a breach of duty, even if these decisions prove to be wrong retrospectively. To be compliant with the business judgement rule the board must apply the following principles when making business decisions:

- an unbiased and independent board and no conflicts of interest;
- a decision-making process based on appropriate information;
- consideration of alternative scenarios; and
- test of justifiability.

Care and prudence

20 | Do the duties of directors include a care or prudence element?

Yes, the directors must act in compliance with their duty of care and loyalty.

Board member duties

21 | To what extent do the duties of individual members of the board differ?

The duties of the individual members of the board do not differ as they are defined by objective criteria. In particular, the duty of care and loyalty requires the board to act in the same way as a diligent and competent member would have acted in the same circumstances. Compliance with these duties is assessed by reference to an objective standard of diligence unless a member of the board is an expert in a certain field. In this case, the standard applicable to this director will be assessed by reference to a diligent and competent director with the same level of expertise in the relevant field.

Delegation of board responsibilities

22 | To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

Except for its non-transferable and inalienable duties, the board may delegate its responsibilities to third parties, individual board members or committees, or to the management, in each case in accordance with organisational regulations issued by the board. The board, however, remains liable for the due selection, instruction and supervision of the parties to whom it has delegated responsibilities.

Non-executive and independent directors

23 | Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent' directors and how do their responsibilities differ from executive directors?

No. Nevertheless, for listed companies, the SIX Swiss Exchange Directive on information relating to corporate governance (DCG) contains certain disclosure obligations for non-executive members of the board, and the SCBP recommends that the majority of the board should consist of independent members, meaning non-executive members who have either never, or at least not for the past three years, been members of the management, and who have no (or comparatively minor) business relations with the company. In addition, proxy adviser guidelines often contain specific requirements regarding the independence of members of the board, typically based on years of service, the relationship with significant shareholders and commercial arrangements with the company, among other things.

Board size and composition

24 | How is the size of the board determined? Are there minimum and maximum numbers of seats on the board? Who is authorised to make appointments to fill vacancies on the board or newly created directorships? Are there criteria that individual directors or the board as a whole must fulfil? Are there any disclosure requirements relating to board composition?

The board must be composed of at least one member; there is no maximum number specified by law or any regulations, but the articles of association may provide for these limits. The size is determined by the shareholders' meeting electing the board members and filling vacancies. The SCBP recommends that the size of the board should match the needs of the individual company and that the board should be composed of members of both genders.

Only natural persons may be elected as board members, and there must be at least one Swiss resident – not necessarily also a Swiss citizen – authorised to legally bind the company (with individual signing authority), but this person does not need to be a board member. While there are currently no gender diversity requirements per se or age limits, it should be noted that as per a new provision of the Swiss Code of Obligations, which entered into force on 1 January 2021, companies that are subject to an ordinary audit and in which each gender does not make up at least 30 per cent of the board as from the financial year 2026 and 20 per cent of the senior management as from the financial year 2031, respectively, must indicate in their remuneration reports the reasons why genders are not represented as required and the measures being taken to increase the representation of the less well-represented gender.

As regards disclosure, the names, functions and residence of each board member are publicly available in the commercial register. The

DCG requires listed companies to disclose information on the board composition, including details on the organisation of the board and the compensation of its members.

Board leadership

25 Is there any law, regulation, listing requirement or practice that requires the separation of the functions of board chair and CEO? If flexibility on board leadership is allowed, what is generally recognised as best practice and what is the common practice?

The separation of the two functions of board chair and chief executive is generally considered as best practice, even though in many SMEs and even in a small minority of listed companies, the board chair and CEO are the same person.

Board committees

26 What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

Non-listed companies are not required to establish any board committees. Listed companies are required by the Ordinance against Excessive Compensation in Listed Companies to establish a compensation committee, whose members are elected by the shareholders' meeting. There are no restrictions with respect to the establishment of (additional) committees.

The SCBP recommends establishing further committees, such as a nomination committee. Listed companies and larger non-listed companies often establish a compensation (and nomination) committee, an audit committee, and some also a strategy committee.

Board meetings

27 Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

Unless the articles of association provide otherwise, only one board meeting per year is required (to prepare for the annual shareholders' meeting and to resolve on the agenda and the respective motions). The SCBP, however, recommends a minimum of four board meetings per year.

Board practices

28 Is disclosure of board practices required by law, regulation or listing requirement?

Non-listed companies are not required to make any such disclosure. Listed companies are required by the DCG to disclose certain board practices, in particular the allocation of tasks within the board, the members list, tasks and areas of responsibility for each board committee and the working methods of the board and its committees.

Board and director evaluations

29 Is there any law, regulation, listing requirement or practice that requires evaluation of the board, its committees or individual directors? How regularly are such evaluations conducted and by whom? What do companies disclose in relation to such evaluations?

No, there is no formal legal requirement to conduct evaluations. However, boards of larger non-listed companies and of listed companies regularly conduct an annual self-assessment. The SCBP recommends that the board should self-evaluate its own performance and that of its committees annually. Listed companies that conduct these evaluations may disclose this in their annual reports but are not obliged to make any disclosure (in particular of the results of the evaluation).

REMUNERATION

Remuneration of directors

30 How is remuneration of directors determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions or compensatory arrangements between the company and any director?

For non-listed companies, there is no regulation or practice restricting the company with respect to the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions or compensatory arrangements between the company and a director – as long as the arm's length principle is observed. Typically, the board determines the compensation and other relevant matters itself.

For listed companies, the Ordinance against Excessive Compensation in Listed Companies (OAEC) requires an annual binding shareholder vote on the maximum amount of remuneration of the board. According to the OAEC, the articles of association must contain provisions regarding the principles governing the compensation of the board, the maximum amount of loans and similar payments made to members of the board, and the maximum term of a service contract of a member of the board, which may not exceed 12 months.

Remuneration of senior management

31 How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions or compensatory arrangements between the company and senior managers?

For non-listed companies, there is no regulation or practice restricting the company with respect to the remuneration of senior management, the length of employment contracts, loans to senior management or other transactions or compensatory arrangements between the company and a member of senior management – as long as the arm's-length principle is observed. Typically, the board determines the management's compensation and other relevant matters.

For listed companies, the OAEC requires an annual binding shareholder vote on the maximum amount of remuneration of the management. According to the OAEC, the articles of association must contain provisions regarding the principles governing the compensation of the management, the maximum amount of loans and similar payments made to members of the management and the maximum term of employment contracts with senior management, which may not exceed 12 months.

Say-on-pay

32 Do shareholders have an advisory or other vote regarding remuneration of directors and senior management? How frequently may they vote?

Yes, but only in listed companies. The OAEC requires listed companies to hold an annual shareholders' vote on the maximum amount for the compensation of the members of the board, the management and the advisory board (if any). This vote is binding; that is, the company is not permitted to pay any compensation to the board, senior management or advisory board without having it approved by the shareholders' meeting. While this vote must be held annually, there is some flexibility

with respect to its technicalities, in particular, whether the variable compensation is voted on separately, whether the vote is retrospective or prospective, and to which periods the vote relates (often, listed companies approve the compensation for the next business year at the ordinary shareholders' meeting held in the previous business year). In addition, most listed companies conduct an annual non-binding shareholder vote on the compensation report for the previous business year.

DIRECTOR PROTECTIONS

D&O liability insurance

33 Is directors' and officers' liability insurance permitted or common practice? Can the company pay the premiums?

The insurance by a company of its directors and officers against directors' and officers' (D&O) liability, also including the payment of the respective premiums by the company, is generally accepted as permissible. D&O insurance is standard for listed companies and for large non-listed companies.

In addition to liability under civil law, a member of the board may also be liable under criminal law. Furthermore, the board may also be liable for social security contributions and taxes. Typically, these liabilities are excluded from D&O insurance.

Indemnification of directors and officers

34 Are there any constraints on the company indemnifying directors and officers in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

It is generally considered acceptable for the company to undertake to indemnify its directors and officers for the liabilities incurred in their professional capacity, provided, however, that these liabilities were not caused by the director's or the officer's intentional or grossly negligent breach of his or her duties.

Advancement of expenses to directors and officers

35 To what extent may companies advance expenses to directors and officers in connection with litigation or other proceedings against them or in which they will be a witness?

Companies may advance expenses if:

- the proceedings were not caused by the director's or the officer's intentional or grossly negligent breach of his or her duties;
- the advancement complies with the rules applicable to loans made to directors or officers of the company; or
- advancement of expenses in connection with proceedings in which directors or officers will be a witness does not violate witness-tampering rules.

Exculpation of directors and officers

36 To what extent may companies or shareholders preclude or limit the liability of directors and officers?

The Swiss Code of Obligations allows the shareholders' meeting to grant directors and officers a discharge for their past activities, which, if granted, will preclude the company and the shareholders who voted in favour of such a discharge from suing the discharged directors and officers for facts that were known at the time the discharge was granted. Shareholders who did not take part in the vote on the granting of the discharge or who voted against it must bring an action against the discharged directors and officers within the six months following the vote on the discharge. If they fail to do so, they will also be precluded to act against the discharged directors and officers.

Owing to the lack of clear and recent case law on the topic, there is some uncertainty regarding the validity of any preclusion or limitation, in advance, of the directors' and officers' liability, whether through amendments of the articles of association or through other shareholder action.

DISCLOSURE AND TRANSPARENCY

Corporate charter and by-laws

37 Are the corporate charter and by-laws of companies publicly available? If so, where?

Yes, the articles of association are publicly available in the commercial register at the companies' registered offices; delivery may either be requested from the commercial registry for a low fee or they may be downloaded free of charge. However, the organisational regulations, governing the organisation of the board and the delegation to the management and its reporting, are not publicly accessible.

Listed companies typically make available their articles of association on their websites, as well as, their organisational regulations.

Company information

38 What information must companies publicly disclose? How often must disclosure be made?

The publicly accessible commercial register excerpt of each company registered in Switzerland contains certain fundamental pieces of information regarding these companies, in particular their corporate purpose, their share capital, any restrictions on transfers of shares, the identity of their board members and other authorised signatories, their external auditors (if any) and information regarding their histories (such as changes in share capital, registered offices and mergers). Any commercial register filings are also published in the Swiss Official Gazette of Commerce.

Companies are required to issue an annual (financial) report. Non-listed companies must make this report available to their shareholders only, while listed companies must make it publicly available. In addition, various disclosure obligations apply to listed companies, in particular, the following:

- the obligation to make publicly available the disclosure notifications sent by significant shareholders with participations of 3 per cent or more;
- the obligation to report and disclose transactions in shares of the company by members of the board or management (management transactions);
- periodic reporting obligations obliging issuers to, inter alia, publish half-year accounts and a corporate calendar;
- the obligation to inform the market of potentially price-sensitive facts (ad hoc publicity rule); and
- the obligation to disclose a separate corporate governance chapter in their annual reports on a comply or explain basis with information regarding, inter alia, the company's group and capital structure, its board, its management and auditors, executive compensation, shareholdings and loans, shareholders' participation rights, and change of control and defence measures.

HOT TOPICS

Shareholder-nominated directors

39 Do shareholders have the ability to nominate directors and have them included in shareholder meeting materials that are prepared and distributed at the company's expense?

If any item of the agenda covers the appointment of directors, any shareholder (even if holding only one share) may nominate its own candidate by way of a motion, which may be presented either before or during the shareholders' meeting.

If none of the agenda items covers the appointment of directors, a shareholder may not nominate a director by way of a motion. He may, however, request an amendment of the agenda to include the appointment of his candidate as a director; if the requirements for such a request are fulfilled, the amendment will have to be included by the board in the invitation to the shareholders' meeting.

Shareholder engagement

40 Do companies engage with shareholders? If so, who typically participates in the company's engagement efforts and when does engagement typically occur?

In non-listed companies, beyond their involvement in shareholders' meetings, (anchor) shareholders often have their representatives on the board or at least maintain a close relationship and regular contact with the board.

In listed companies, stock exchange law, in particular insider trading rules, restricts interactions between the board and the company's shareholders. Nevertheless, boards of listed companies typically seek to regularly involve their (anchor) shareholders in strategy considerations. Given the need to avoid sharing sensitive information, any meetings among board members and shareholders are typically held following the publication of the company's financial statements when the risk of sharing price-sensitive facts is lower.

Sustainability disclosure

41 Are companies required to provide disclosure with respect to corporate social responsibility matters?

As per the new provisions regarding transparency in raw materials companies, as from the financial year 2022, companies subject to an ordinary audit and which are either themselves or through a company that they control involved in the extraction of minerals, oil or natural gas or in the harvesting of timber in primary forests must produce a report each year on the payments they have made to state bodies.

CEO pay ratio disclosure

42 Are companies required to disclose the 'pay ratio' between the CEO's annual total compensation and the annual total compensation of other workers?

No.

Gender pay gap disclosure

43 Are companies required to disclose 'gender pay gap' information? If so, how is the gender pay gap measured?

No.

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UPDATE AND TRENDS

Recent developments

44 Identify any new developments in corporate governance over the past year. Identify any significant trends in the issues that have been the focus of shareholder interest or activism over the past year.

On 19 June 2020, the Swiss Parliament finally approved the bill aiming to modernise Swiss corporate law by introducing, in particular:

- the possibility to state the share capital of a company incorporated in Switzerland in the foreign currency which is essential for its business;
- new rules on the holding of general meetings, allowing, in particular, to pass resolutions in writing; and
- new rules on restructuring, which, in particular, introduces illiquidity as a triggering event forcing the board to take measures.

These changes along with most of the bill are not expected to come into force before 2022.

Coronavirus

45 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Companies are currently allowed to replace the traditional physical shareholders' meetings by ordering shareholders to exercise their rights in writing or online or through an independent proxy appointed by the organiser. Most of the major Swiss listed companies choose the second option (ie, the use of an independent proxy appointed by the organiser).

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